QUESTIONS PRESENTED

Whether the court of appeals properly invalidated the severity regulation, 20 C.F.R. 404.1520(c), which authorizes the Secretary to summarily deny benefits on medical evidence alone to claimants who might be able to establish that their medical impairments render them unable to do their past work, or other work, if appropriate consideration of statutorily identified vocational factors were not precluded by the regulation.

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COUNTERSTATEMENT

The Secretary purports to vindicate the severity regulation as a consistent and longstanding interpretation of the Social Security Act. As Respondent sets forth below, the history of the regulation reveals that the Secretary originally implemented the Act as allowing no more than a *de minimis* threshold test for screening out meritless claims. In recodifying the "slightness standard" in 1978, however, the Secretary effected a substantive change in the threshold standard, which he enforced through binding instructions to agency adjudicators. Thus, at all times relevant to this case, the Secretary's interpretation of the Act as implemented through the severity regulation was far from consistent with his original interpretation. Rather, he construed and applied the severity regulation so as to deny meritorious disability claims, and improperly increase the claimant's burden of proof in disability determinations.

1. The statutory definition of disability, adopted for the Social Security disability program in 1954[1] is an

> inability to engage in any substantial gainful activity by reason of any medically determinable mental or physical impairment which can be expected to result in death or which has lasted or can be expected to be of long-lasting and indefinite duration . . . .

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[1] This definition was adopted for use in the current disability benefits program in 1956. 42 U.S.C.§ 423(d)(1)(A) (1956) (amended 1965). The 1965 amendment required the impairment to be one "which has lasted or can be expected to last for a continuous period of not less than 12 months. . . ." Pub.L.No. 89-97, § 303(a), 79 Stat. 286 (amending 42 U.S.C. " 423(d)(1)(A) (1956).

42 U.S.C. § 416(i) (1954).[2]

Regulations implementing the 1954 statute made clear that the vocational factors of "education, training and work experience" were to be considered in determining "whether an individual's impairment makes him unable to engage in . . . [substantial gainful] activity." 20 C.F.R. § 404.1501(b) (1958); 22 Fed.Reg. 4362 (June 20, 1957). Subsequent revisions to the regulations reiterated that:

> Conditions which fall short of the levels of severity indicated [for automatic eligibility] must also *be evaluated in terms of whether they do in fact prevent the individual from engaging in any substantial gainful activity, taking into account his age, education, training and work experience.*

25 Fed.Reg. 8100 (Aug. 24, 1960) (emphasis added).

A claim could only be denied on medical grounds alone if the impairment was so slight that no one could be found disabled following a full evaluation. Thus the regulations promulgated in 1960 stated that:

> [M]edical considerations alone may justify a finding that the individual is now under a disability where the only impairment is a slight neurosis, slight impairment of sight or hearing, or other similar abnormality or combination of abnormalities.

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[2] The disability program for disabled workers is now codified in Title II of the Act, 42 U.S.C. §§ 401 *et seq.* Title XVI of the Act, 42 U.S.C. §§ 1381 *et seq.*, establishes the Supplemental Security Income Program ("SSI") for disabled persons who are financially needy. Many claimants qualify for benefits under both programs, and the relevant statutory provisions and the implementing federal regulations defining disability are identical for the two programs. Because Respondent's current claim is for Title II disability benefits only, this brief refers to the Title II statutory and regulatory provisions.

25 Fed.Reg. 8100 (Aug. 24, 1960).

2. The 1967 amendments to the Act codified the vocational considerations contained in the Secretary's contemporaneous interpretation of the 1954 Act. The amendments provided that:

> (A) an individual (except a widow, surviving divorced wife, widower or surviving divorced husband for purposes of section 420(e) or (f) of this title) shall be determined to be under disability only if his physical or mental impairment or impairments are *of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy,* regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 423(d)(2)(A) (emphasis added).

The 1967 amendments also provided benefits for disabled surviving spouses. Both the Senate Report and the Conference Report emphasized that the test of disability for surviving spouses was "*more restrictive than that for disabled workers* and childhood disability beneficiaries" in that determinations "*would be based on the level of severity of the impairment . . . without regard to nonmedical factors* such as age, education, and work experience, *which are considered in disabled workers cases.*" S.Rep. No. 744, 90th Cong., 1st Sess. (1967) (emphasis added); *see also* H.Conf.Rep. No. 1030, 90th Cong., 1st Sess. (1967), reprinted in [1967] U.S. Code Cong. & Admin. News 3197-3198.

3. In 1978, the Secretary first promulgated regulations stating that a claim could be denied on the ground

that it was "not severe." 43 Fed.Reg. 9284, 9303 (March 7, 1978). In introducing this language, he stated that it was "not intended to alter the levels of severity for a finding of disabled or not disabled on the basis of medical considerations alone, or on the basis of medical and vocational considerations." *Id.* at 9297. He represented that this regulation ("the severity regulation") referred only to impairments that "have such a minimal effect on the individual that they would not be expected to interfere with his or her ability to work, irrespective of his or her age, education, and work experience." *Id.* at 9296.[3]

When the 1978 regulations were published in final form, the Secretary noted in the comments section that it had been suggested "that the term [not severe] indicates a change in definition of disability, while another [commenter] believed it could be seen as a device to limit entitlement." 43 Fed.Reg. 55357 (November 28, 1978). The Secretary reiterated that the regulations were not intended to alter the levels of severity for a finding of disabled or not disabled. *Id.* at 55358. The Secretary further stated that "the burden of proof remains as established in the case law and observed by SSA [Social Security Administration]." *Id.* at 55359. Despite these assurances, the percentage of claims denied on medical grounds alone in the Title II program rose from 8.4% in 1975 to over 40% in 1979.[4]

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[3] The severity regulation was introduced as the second of a series of questions used to evaluate disability claims called the "sequential evaluation." See *Heckler* v. *Campbell*, 461 U.S. 548, 460 (1983).

[4] Staff of House Committee on Ways and Means, 99th Cong. 2d Sess., *Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means*, (Comm. Print 1986) at 114. The statistical evidence shows that the increase in severity denials began even before the official promulgation of the severity regulation. One court has noted that there is evidence that

4. In 1980, the Secretary renumbered and rewrote the regulations. 45 Fed.Reg. 55556 (August 20, 1980). The rewritten regulations stated that an impairment would not pass the severity threshold unless it "significantly" restricted the ability to engage in specified basic work activities. The severity regulation is now codified at 20 C.F.R. 404.1520(c).

The Appeals Council, the highest adjudicative body of the Social Security Administration (SSA) (see 20 C.F.R. § 404.981), commented on these regulations when they were first proposed. It stated that the concept of a "significant" limitation on basic work activities was inconsistent both with the Secretary's stated position that the severity regulation was not intended to change the previous regulatory concept of slightness and with the definition in the preamble to the regulation which phrased the inquiry in terms of "any" limitation.[5] The Appeals Council also

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the severity regulation was enforced prior to its publication through internal administrative actions. *See Dixon* v. *Heckler*, 589 F.Supp. 1494, 1506-1507 (S.D.N.Y. 1984), *aff'd* 785 F.2d 1102 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (July 15, 1986) (No. 86-2). In 1984, the percentage declined somewhat as a result of court orders enjoining its application in the Ninth Circuit, New York, Illinois, and other states.

[5] [T]he specific listing of physical and mental functions and the statement that an impairment is not severe unless these functions are *significantly* limited is inconsistent with the stated position of the Social Security Administration that the reference to "basic work activities" (now called "basic work-related functions") was not intended to change, but merely clarify, the previous regulatory terms "a slight neurosis, slight impairment of sight or hearing, or other slight abnormalties." Further, the current definition is also inconsistent with the definition in the preamble which states that an impairment is not severe when it "does not *in any way* limit a person's physical or mental ability to do those things needed to work." In addition, the Council has noted that there has been a vast increase in denials based on an

noted that there had been a vast increase in denials based on non-severity even though the 1978 regulations asserted that they did not change the standard for denying disability benefits.

When the 1980 regulations were published in final form, the Secretary admitted that he had effected a substantive change back in 1978:

> Although this evaluation approach to impairments that are not severe has been in the regulations for some time, *we expanded it in 1978* . . .
>
> We anticipated that greater program efficiency would be obtained by this provision *by limiting the number of cases* in which it would be necessary to follow the vocational evaluation sequence . . . .

45 Fed.Reg. 55574 (August 20, 1980) (emphasis added).

The Secretary also noted that he was studying the feasibility of revising the rules, conceding that it might be as efficient to screen claims based on ability to return to prior work. *Ibid.*

5. The Secretary implemented the 1980 regulations through two Social Security rulings (SSR's). instructing adjudicators on the proper construction of the severity regulation: Social Security Ruling 82-55, Medical Impairments That Are Not Severe (effective August 20, 1980

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impairment allegedly being "not severe," contrary to the statement in the preamble to the present regulations that this was not expected to occur. We recommend deletion of the word "significantly."

Memorandum from Appeals Council to Office of Policy and Procedure, on "Recodification of Regulations on Determining Disability and Blindness," August 8, 1979. Reproduced in Joint Appendix lodged with this Court in *Bowen* v. *Dixon*, No. 86-2, p. 667 (emphasis in original).

(Cum.Ed. 1982), see Appendix attached hereto, 1a; and Social Security Ruling 82-56, The Sequential Evaluation Process (effective August 20, 1980 (Cum.Ed. 1982)) see Appendix, attached hereto, 6a. These rulings were binding on all adjudicative components of SSA. 20 C.F.R. § 422.408.[6]

These rulings made clear that the severity regulation represented an additional eligibility requirement rather than a continuation of the slightness screening standard introduced in 1960. SSR 82-55 provided 20 examples of impairments which were considered irrebuttably non-severe, thus shedding any pretense that an assessment would be made of the effect of an impairment on the claimant's ability to engage in substantial gainful activity. The ruling included such impairments as documented osteoarthritis, colostomies, diabetes and hypertension. Furthermore, the ruling mandated that adjudicators ignore the combined effects of two or three or more non-severe medical impairments suffered by the same individual. SSR 82-56 specified that the claimant could no longer make a prima facie showing of disability by proving he did not have the "residual functional capacity" (the actual capacity remaining despite the impairment, 20 C.F.R. § 404.1567) to perform his former work: "[A]n impairment will not be considered to be severe even though it may prevent the individual from doing work that the individual has done in the past."

6. In 1983 the Secretary undertook a study "to reexamine the 'not severe' impairment concept . . ." Final

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[6] SSR 82-55 was "obsoleted" without replacement. SSR 85-III-II (April, 1985). SSR 82-56 was replaced in 1986 by SSR 86-8. Only SSR 82-55 and SSR 82-56 were effective at the time respondent Yuckert's case was adjudicated.

Report of Workgroup—DECISION, reproduced in Joint Appendix to *Bowen* v. *Dixon*, *supra*, at 610. This study surveys the history of the severity step, notes its inherent subjectivity, and observes the widespread difficulty in understanding or applying the step. *Id.* at 620. The study draws two conclusions: (1) despite statements made regarding the purpose of the step, "its application" after 1975 "suggests a change of position," *ibid.*; and (2) SSR 82-55 in particular "may contribute to overinclusive use" of the step, *id.* at 621. The study states that the step "has not been, and probably cannot be, clearly explained either to SSA adjudicators or to the public." *Id.* at 622. The workgroup developed options for remedying the problems with the regulation. The workgroup found two of the options to "have merit": (1) a regulatory revision returning to the prior slightness standard at step two for screening out frivolous claims; and (2) "deletion or modification of step 2 with a redefined not severe impairment concept incorporated into a revised regulation on RFC [residual functional capacity]." *Id.* at 625, 629.

The Secretary never acted on these recommendations. In the absence of any regulatory action, courts proceeded to rule on the argument presented below that the regulation, as applied, conflicts with the Act. At the circuit court level, these decisions, while differing on the appropriate remedy, have found the Secretary's construction and application of the severity regulation to contravene the mandates of the Social Security Act.

7. In November, 1985, the Secretary published SSR 85-28, an interpretive ruling which, in his brief, he appears to describe as embracing a *de minimis* standard for applying the severity regulation. Brief for the Petitioner (Pet. Br.) 13-14, 26, 48 n.29. The ruling itself, however, insists that it is simply clarifying rather than

changing the non-severe impairment policy. Pet.App. 37a. In 1986, the Secretary published SSR 86-8, replacing SSR 82-56 as the Secretary's statement on the sequential evaluation process. Neither SSR 85-28, nor SSR 86-8 was applied in Respondent's case.

8. On March 14, 1986, SSA issued an internal report on a recent agency study of the severity regulation. The study found that the state agency evaluators misapplied the regulation in nearly 40% of the cases. Associate Commissioner for Disability, Social Security Administration, "Report on the Not Severe Case Study," (March 14, 1986), lodged with this Court, in May, 1986. See Reply Brief for the Petitioner at 4.

9. The proceedings in this case began when Janet J. Yuckert filed her application for Social Security and Supplemental Security Income disability benefits on October 30, 1980. Respondent Yuckert is a former travel agent whose principal impairment is "bilateral labyrinthine dysfunction," a condition which causes dizziness and makes it difficult to focus her eyes, to read or to stand. Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Appendix (Pet.App.), 3a. She "can see only one word at a time." *Ibid.* "Her dizziness and equilibrium problems limit her ability to walk or drive: she walks cautiously, staying close to walls or counters, ..." *Ibid.* "Both of Yuckert's treating physicians concluded that she was disabled." *Ibid.*

Respondent Yuckert's application was initially denied at step four of the sequential evaluation (finding that she retained the residual function capacity to do her past work), rather than at step two, the severity step. Joint Appendix (J.A.) 19-21. She was denied again on reconsideration. *Id.* at 23-26. She appealed, and, after a hear-

ing, the Administrative Law Judge affirmed the denial of benefits, basing the decision on the severity regulation. Pet.App. 28a. The Appeals Council denied her request for review by a letter dated June 25, 1982, Pet.App. 22a, and, on August 18, 1982, Respondent Yuckert filed a timely appeal in the Western District of Washington alleging that the Administrative Law Judge's decision failed to give proper weight to the opinion of the treating physician and was not based on substantial evidence. Respondent Yuckert did not challenge the validity of the "non-severe" regulation in the district court. On October 25, 1984, the district court adopted the magistrate's recommendation and affirmed the Secretary's decision. Pet.App. 14a and 20a.

10. Respondent Yuckert appealed to the Ninth Circuit Court of Appeals on December 20, 1984 and shortly thereafter moved for remand pursuant to an order enjoining use of the severity step issued earlier that year in a circuit-wide class challenge to the severity regulation. *Smith* v. *Heckler*, 595 F.Supp. 1173 (E.D.Cal. 1984), *appeal pending*, No. 85-2178 (9th Cir., argued Oct. 10, 1985).[7] This motion was denied.

Respondent Yuckert then moved to stay proceedings pending a ruling in the Ninth Circuit in *Smith* v. *Heckler*. The Secretary did not oppose the motion for stay and even "suggest[ed] that . . . argument in [this] case be stayed."

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[7] *Smith* v. *Heckler* was filed as a class challenge to the severity regulation in December, 1983. On June 6, 1984, a circuit-wide class was certified and the use of the severity step was preliminarily enjoined. On November 27, 1984, following complaints that the Secretary was delaying implementation of the preliminary injunction, the court issued a more detailed order elaborating procedures for reevaluating pending administrative claims and remand of claims pending before the courts.

Appellee's Response to Appellant's Motion to Stay Proceedings. However, the stay motion was also denied and the court proceeded to consider Respondent Yuckert's appeal. At this point Respondent challenged the validity of the severity regulation.

On October 24, 1985, the court of appeals reversed and remanded to the district court. *Yuckert* v. *Heckler*, 774 F.2d 1365 (9th Cir. 1985), (9th Cir. 1985), Pet.App. 1a. The Ninth Circuit's analysis of the severity regulation was informed by the facts of the individual claim before it. The Ninth Circuit reviewed the evidence of Respondent's conditions and noted that an expert witness had testified that "Yuckert was incapable of returning to her past work and that she probably could not perform any other job until her condition improved." Pet. at 3a. The court observed that under Social Security Ruling 82-56—the Secretary's own binding instruction to SSA personnel—adjudicators were required to ignore such evidence of Respondent's inability to return to her prior work in determining whether she had a severe impairment. Pet. 10a, n.8.

The court concluded that by ignoring such evidence the severity step violates the "long established" statutory allocation of the burden of proof in disability determinations and "does not permit the individualized assessment of disability required by the Act."[8] Pet.App. 8a-9a.

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[8] The court relied on *Johnson* v. *Heckler*, 769 F.2d 1202, 1210-13 (7th Cir. 1985), *reh'g denied*, 776 F.2d 166 (1985), *petition for cert. filed*, 54 U.S.L.W. 3600 (Mar. 11, 1986) (No. 85-1442); *Baeder* v. *Heckler*, 768 F.2d 547, 551-53 (3d Cir. 1985); *Dixon* v. *Heckler*, 589 F.Supp. 1494, 1502-06 (S.D.N.Y. 1984), 785 F.2d 1102 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (July 15, 1986); *Delgado* v. *Heckler*, 772 F.2d 570, 574 (9th Cir. 1983); and referred to *Heckler* v. *Campbell*, 461 U.S 458, 467 (1983), for the "statutory scheme for individual determin ions."

Accordingly, the court held that the severity regulation violates the Social Security Act.

Subsequent to oral argument in the court of appeals but prior to issuance of the decision, the Secretary submitted a draft of a new ruling purporting to clarify or alter the "non-severe" step. In revised form, this draft ruling was eventually to become SSR 85-28, discussed *infra* at 29. The court of appeals "express[ed] no view as to the validity" of this draft ruling because it was unpublished and because it attempted to interpret a regulation which the court had invalidated. Pet.App. 9a n.6.

The court remanded Respondent Yuckert's case to the district court "with instructions that the Secretary reevaluate Yuckert's claim . . . ." Pet.App. 11a-12a. However, remand from the district court to the Secretary has been deferred at the request of the Secretary, and over Respondent's objections, pending the present proceedings.

SUMMARY OF ARGUMENT

The Social Security Act defines disability in terms of both medical and vocational considerations. Under this statutory definition, a claimant is eligible for disability benefits if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for twelve months. 42 U.S.C. § 423(d)(1)(A). The statute further provides that to determine whether an impairment is so severe that it prevents the claimant from engaging in substantial gainful activity, the impairment must be evaluated in terms of its effect on the claimant's ability to return to his past work or to perform other work the claimant is qualified for in light of his age, education and

work experience. 42 U.S.C. § 423(d)(2)(A). This statutory definition recognizes that the same impairment affects people with different vocational characteristics differently. Thus the older, the less educated, and the less training a claimant has, the more likely it is that his impairments will prevent him from engaging in substantial gainful activity, and will therefore render him eligible for disability benefits.

Three requirements derive from the statutory definition of disability. First, the Act's directive that disabling inability to work be determined by reference to a claimant's ability to do his "previous work" and then to his ability to do other work has been interpreted by all the courts of appeals to allocate the burden of proof in accordance with this mandated two-stage inquiry. While the claimant bears the ultimate burden of proving disability, he meets his prima facie burden by showing that his medical impairments prevent him from performing his past work. The Secretary then has the burden of going forward to show the claimant is able to perform other work.

Second, the Act requires an individualized determination of disability: "[A]n *individual* . . . shall be determined to be under a disability only if *his* physical or mental impairments are of such severity that *he* is not only unable to do *his* previous work but cannot, considering *his* age, education, and work experience, engage in . . . [other work]." 42 U.S.C. § 423(d)(2)(A) (emphasis added).

Third, a claimant who proves himself unable to do his previous work or other work because of his impairments is disabled under the Act; he therefore cannot be denied benefits on medical grounds alone if consideration of these relevant vocational factors might result in a finding of disability.

For a threshold screening standard to comply with the statute, it must be a *de minimis* test. Under a *de minimis* test, an individual can be denied benefits on medical evidence alone only if his impairment is so slight that it could not interfere with the individual's ability to work, irrespective of age, education and work experience. A *de minimis* standard thus incorporates an implicit consideration of the relevant vocational factors by asking whether any set of vocational factors, when considered with a claimant's impairment(s), might prevent him from working. Similarly, a *de minimis* test respects the Act's requirement of individualized determinations by ensuring that an individualized evaluation of vocational factors will not be precluded at later stages of evaluation if they might affect the ultimate determination of disability. Finally, a *de minimis* standard respects the allocation of the burdens of proof by ensuring that any claimant who proves an inability to do past work due to his reduced functional ability (and thus meets his *prima facie* burden of proof) will not be denied benefits on medical evidence alone.

The severity regulation formally adopted by the Secretary in 1978 does not describe a *de minimis* threshold standard; it authorizes a stricter one. It defines a nonsevere, and thus disqualifying, impairment as one that does not "significantly limit" a claimant's ability to perform "basic work activities." It expressly prohibits any consideration of age, education and work experience at all—even the type of implicit vocational consideration that the *de minimis* test contemplates. It substitutes a judgment regarding the ability to do basic work activities for an evaluation of the claimant's actual residual capacity to do his prior work. It thus creates an overbroad presumption of non-disability based on an unspecified degree of functional loss in reference to the performance of an abstract concept of work.

To counter the conflict between the statutory definition of disability and the severity regulation, the Secretary claims he has sought to apply the regulation consistently with a *de minimis* standard. Virtually every court of appeals has concluded that the Secretary has applied the severity regulation to impose upon claimants a stricter than *de minimis* step two test. The Secretary's contrary claim is belied by the Social Security rulings which he used to implement the regulation, the internal studies of the implementation of the regulation, as well as the statistics documenting the dramatic rise in the percentage of claims denied at step two.

The Secretary also argues that the regulation should be upheld no matter how strict a standard it actually imposes and regardless of whether it is inconsistent with the burden of proof law. In addition, he misrepresents what the court of appeals held, and undertakes a question-begging examination of the legislative history.

To defend a stricter than *de minimis* test, the Secretary disfigures the Act by bifurcating the statutory definition. His argument cannot survive even a cursory glance at the statute. The first words in § 423(d)(2)(A) are, "[f]or purposes of paragraph (1)(A)—. . . ." The two subsections form a unitary statutory definition: section (d)(2)(A) structures the inquiry in determining whether a claimant is "unable to engage in any substantial gainful activity" within the meaning of section (d)(1)(A).

As the court of appeals correctly noted, the Act requires the Secretary to consider "both medical and vocational factors" in making the ultimate determination of disability. Contrary to the Secretary's assertions, nothing in the court's decision bars implementation of a *de minimis* threshold standard. The court invalidated the

Secretary's severity regulation because it resulted in denials of benefits to claimants based on medical factors alone, even where consideration of vocational factors could have dictated a different result.

The Secretary's opposition to the invalidation of the regulation by the court below is really a challenge to the remedy which the court chose to apply. The circuits are divided over the remedial question of whether to judicially impose a narrow construction on the severity regulation in an attempt to create a *de minimis* test or to invalidate the regulation, thereby leaving the Secretary free to promulgate new regulations consistent with the statutory mandate. However, Respondent Yuckert's interest in the present case is in having her claim adjudicated under a *de minimis* standard. Either remedy, invalidation of the regulation or imposition of a narrowing construction, is intended to ensure that claims are subjected to no more than a *de minimis* standard. Respondent Yuckert would be entitled to the remand afforded her by the court of appeals even if this Court were to decide the remedy chosen by the court below was improper. It is Respondent's position, however, that invalidation of the regulation is not only a permissible remedy, but, in fact, the most effective remedy in light of the Secretary's steadfast refusal to construe the severity regulation in a *de minimis* fashion despite the chorus of appellate decisions directing him to do so.

ARGUMENT

The Secretary has mischaracterized the court of appeals' decision, the decisions of other circuits, and his own record of implementing the regulation invalidated below in order to characterize this appeal as concerning the legitimacy of a *de minimis* regulation for screening

out meritless claims for disability benefits. In seeking reversal of the Ninth Circuit's judgment, the Secretary asks this Court to ratify a regulation which the courts of appeals have found to be in conflict with the mandates of the Social Security Act.[9] Each of these courts has interpreted the requirements of the Act in the same way—as authorizing a *de minimis* threshold severity step, but not a stricter one that imposes higher burdens on claimants. Each of these courts has ruled that a legitimate *de minimis* step must comport with the rule that a claimant meets his *prima facie* burden of proof by showing an impairment rendering him unable to return to his past work. Each of these courts has ruled that a *de minimis*

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[9] The appellate courts are divided only with respect to the corresponding remedial question. Five circuits, including the Ninth Circuit, have remedied the conflict between the regulation and the Social Security Act by invalidating the regulation. *Wilson* v. *Secretary of Health and Human Services*, 796 F.2d 36 (3rd Cir. 1986), and *Baeder* v. *Heckler*, 768 F.2d 547 (3rd Cir. 1985); *Johnson* v. *Heckler*, 769 F.2d 1202 (7th Cir. 1985), *reh'g. denied*, 776 F.2d 166 (1985), *petition for cert. filed*, 54 U.S.L.W. 3600 (Mar. 11, 1986) (No. 85-1442); *Brown* v. *Heckler*, 786 F.2d 870 (8th Cir. 1986); *Hansen* v. *Heckler*, 783 F.2d 170 (10th Cir. 1986). *See also Dixon* v. *Heckler*, 785 F.2d 1102 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (July 15, 1986) (No. 86-2) (affirming preliminary injunction enjoining the regulation).

Four circuits have remedied the conflict between the severity step policy and the Social Security Act by attempting to impose a narrow construction on the Secretary's use of the regulation: *Evans* v. *Heckler*, 734 F.2d 1012 (4th Cir. 1984); *Stone* v. *Heckler*, 752 F.2d 1099 (5th Cir. 1985); and *Estran* v. *Heckler*, 745 F.2d 640 (5th Cir. 1984); *Farris* v. *Secretary of Health and Human Services*, 773 F.2d 85 (6th Cir. 1985); and *Salmi* v. *Secretary of Health and Human Services*, 774 F.2d 685 (6th Cir. 1985); *McCruter* v. *Bowen*, 791 F.2d 1544 (11th Cir. 1986); and *Brady* v. *Heckler*, 724 F.2d 914 (11th Cir. 1984). *See also McDonald* v. *Heckler*, 795 F.2d 1118 (1st Cir. 1986) (imposing a narrowing interpretation on the Secretary's recent "clarification" of the severity standard, SSR 85-28).

severity step only screens out groundless claims. Each of these courts has concluded that the Secretary has not, at any time relevant to this case, applied the severity regulation as a *de minimis* standard.

Rather than address this authority, the Secretary adopts the strategy of embracing the appellate rulings which were decided adversely to him and creating a fictional conflict between those decisions and that of the court below. The Secretary consistently characterizes the Ninth Circuit as having prohibited him from enforcing any threshold severity test (*including* a *de minimis* test) under which benefits can "be denied on the basis of medical evidence alone," *i.e.*, without specific consideration of the claimant's age, education or work experience. Pet.Br. 13, 21, 25. The problem for the Secretary in pursuing this argument is that the court below did not disapprove a *de minimis* threshold when it struck down the existing, stricter severity test.

While maintaining that he has always implemented a *de minimis* severity step, the Secretary also defends the statutory legitimacy of a stricter standard. This argument not only conflicts with the Secretary's own description of his practices, but also finds no support in the statute, its legislative history, or the accepted rules on burden of proof in disability cases.

I. THE SEVERITY REGULATION AND THE STEP TWO THRESHOLD SCREENING TEST THAT THE SECRETARY APPLIED PURSUANT TO THAT REGULATION, VIOLATE THE SOCIAL SECURITY ACT

A. The Statutory Definition Of Disability Requires That A Claimant's Impairments Be Evaluated In Terms Of Their Effect On His Actual Ability To Work.

1. The act defines disability and structures the inquiry in disability determinations in 42 U.S.C.

§§ 423(d)(1)(A) and (d)(2)(A). To be found disabled, an individual must prove an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ." 42 U.S.C. § 423(d)(1)(A). The next provision structures the inquiry governing the determination of whether a claimant does, in fact, have such an "inability to engage" in work: the severity of any medically determinable impairment is measured by reference to its effect on the individual's ability to perform his past work, or, in light of his age, education and work exerience, other work.

> *For purposes of paragraph (1)(A)—*
>
> . . . an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . .

42 U.S.C. § 423(d)(2)(A) (emphasis added).

While the Act requires a claimant to have a medically determinable impairment, the determination of whether a claimant has an "inability" to work "by reason of" that impairment depends upon whether the impairment imposes limitations on the claimant such that he is "not only unable to do his previous work but cannot, considering his age, education, and work experience engage in [other work]." 42 U.S.C. §§ 423(d)(1)(A), (2)(A). The Act, in short, requires that the determination of a disability claim involve not only an abstract medical assessment, but a medical-vocational one as well: that is, it demands an assessment of how a claimant's medical impairments affect his actual ability to work. This Court has accord-

ingly recognized that the Act, "defines 'disability' in terms of the effect a physical or mental impairment has on a person's ability to function in the workplace." *Heckler* v. *Campbell*, 461 U.S. 458, 460 (983); *see also*, *Bowen* v. *City of New York*, 106 S.Ct. 2022, 2025 (1986).[10] It is this latter medical-vocational inquiry which implements the Act's recognition that loss of function in the legs is a more severe impairment for an uneducated 60-year-old construction worker than for a 40-year-old attorney.

Three interrelated directives derive from the statutory mandate that a claimant's "disability" be evaluated in terms of how his impairments affect his actual ability to work. First, the Act's directive that disabling inability to work be determined by reference to a claimant's ability to do his "previous work" and then other work has been interpreted by all the courts of appeals to allocate the burden of proof in a two-stage inquiry.[11] In this two-stage

[10] The Secretary argues that the statutory definition of disability permits the Secretary to deny benefits to a claimant, even when a vocational assessment—a determination of the effect his impairments have on his actual ability to work—might show him to be disabled. Pet.Br. at 13-14, 25-6. But Congress knew how to define disabling severity without reference to vocational factors (*i.e.*, age, education, and work experience) when it wished to do so. *Compare*, 42 U.S.C. § 423(d)(2)(B) (defining "disability" for widow(er)s and surviving divorced spouses in terms giving Secretary authority to deny benefits on medical factors alone) *with* 42 U.S.C. § 423(d)(2)(A) (defining disability with reference to vocational as well as medical factors). *See*, 20 C.F.R. § 404.1577 (1985); *Hansen* v. *Heckler*, 783 F.2d 170, 172 (10th Cir. 1986).

[11] *Meneses* v. *Secretary of Health, Education and Welfare*, 442 F.2d 803 (D.C.Cir. 1971); *Hernandez* v. *Weinberger*, 493 F.2d 1120, 1123 (1st Cir. 1974); *Bastien* v. *Califano*, 572 F.2d 908, 912-13 (2d Cir. 1978); *Choratch* v. *Finch*, 438 F.2d 342 (3d Cir. 1971); *Smith* v. *Califano*, 592 F.2d 1235, 1236-37 (4th Cir. 1979); *Lewis* v. *Weinberger*, 515 F.2d 584, 587 (5th Cir. 1975); *O'Banner* v. *Secretary of Health, Education and Welfare*, 587 F.2d 321, 323 (6th Cir. 1978); *Stark* v. *Weinberger*, 497 F.2d 1092, 1097-98 (7th Cir. 1974); *Garrett* v. *Richardson*, 471 F.2d 598, 603-04 (8th Cir. 1972); *Hall* v. *Secretary of Health, Education and Welfare*, 602 F.2d 1372, 1375 (9th Cir. 1979); *Channel* v. *Heckler*, 747 F.2d 577, 579 (10th Cir. 1984); *Francis* v. *Heckler*, 749 F.2d 1562, 1564 (11th Cir. 1985).

inquiry, the claimant meets his prima facie burden of proof by showing that his medical impairments prevent him from performing his past work. Once that showing is made the Secretary has the burden of going forward to show the claimant is able to perform other work that exists in the national economy. If the Secretary makes such a showing, the burden shifts back to the claimant, to rebut the Secretary's evidence and meet his ultimate burden of proving disability.

Second, the Secretary cannot determine the effect of a claimant's medical impairments on his actual ability to work, without scrutinizing the claimant himself. The Act accordingly requires individualized determinations of disability: "[a]n *individual* . . . shall be determined to be under a disability only if *his* physical or mental impairments are of such severity that *he* is not only unable to do *his* previous work, but cannot, considering *his* age, education, and work experience, engage in [other work]." 42 U.S.C. § 423(d)(2)(A) (emphasis added). See *Heckler* v. *Campbell*, 461 U.S. 458, 467 (1983) ("statutory scheme contemplates that disability hearings will be individualized determinations").

Third, given that a claimant is disabled if he proves himself unable to do (1) his "previous work" and (2) considering his "age, education and work experience" any other work as well, a claimant cannot be denied benefits on

medical grounds alone if consideration of these relevant vocational factors might result in a finding of disability.

2. The severity regulation sets forth a screening standard that all claimants must meet to have their claims for benefits fully evaluated, i.e., evaluated by reference to their ability to do their past work and (if they are unable to do such work) other work, "considering their age, education, and work experience." 42 U.S.C. § 423(d)(2)(A). There is nothing wrong with the idea of such a screening test, but in order to conform with the statutory dictates discussed above, any screening test imposed must be no stricter than the "*de minimis* test" approved by all the courts of appeals which have addressed this issue. *See supra*, at 17. Under a *de minimis* test, an individual can be denied benefits on medical evidence alone only if his impairment is so slight that it could not interfere with his ability to work, irrespective of age, education and work experience.

A *de minimis* test respects the Act's mandates regarding the consideration of vocational factors, individualized assessments, and the burdens of proof. A *de minimis* test satisfies the Act's requirement that impairment severity be determined by reference to ability to do prior work and, considering the claimant's age, education and work experience, other work because it does not "screen out" (*i.e.*, deny claims) when one or more of those factors might affect the disability determination at a later step of the sequential evaluation. A *de minimis* step thus incorporates an implicit consideration of the relevant vocational factors, by asking whether *any* set of vocational factors, when considered with claimant's impairment, *might* prevent him from working. Similarly, a *de minimis* test respects the Act's requirement of individualized determinations: while it does not itself involve an individualized consideration of a claimant's specific age, education and work experience at step two, it ensures that an individualized evaluation of vocational factors will not be precluded at steps four and five if they might affect the ultimate determination of disability. Finally a *de minimis* test respects the Act's allocation of the burdens of proof because it ensures that any claimant who proves an inability to do his past work (and thus meeets his prima facie burden of proof) will not be denied benefits at step two.

For the same reasons that a *de minimis* step two test conforms with the Act, any test imposing a higher threshold burden on claimants does not. Any test that denies a claimant benefits at step two, when the claimant has impairments that impose functional limitations severe enough that he might be able to prove disability if his vocational factors were individually considered at step five of the sequential evaluation, violates the Act. Similarly, a test that denies a claim at step two, when the claimant has met or might meet his statutory prima facie burden of proof, violates the Act. In sum, any threshold severity test that imposes an eligibility standard which precludes the consideration of evidence deemed relevant by the Act, when that evidence might affect the determination of disability, violates the Act.

3. The severity regulation does not describe a *de minimis* threshold standard; it authorizes a stricter one. The severity regulation defines a non-severe, and thus disqualifying, impairment as one that does not "significantly limit" a claimant's ability to perform "basic work activities." When the regulation was first promulgated, the Appeals Council recognized that this definition would deny benefits to eligible claimants. *See supra*, at 5. Although "significantly limited" is not defined, the Secre-

tary lists examples of basic work activities, 20 C.F.R. § 404.1521(b), and calls them "the abilities and aptitudes necessary to do most jobs."[12] *Id.*, at § 404.1521(a). The regulation expressly prohibits any consideration of age, education and work experience at all—even the type of implicit consideration that the *de minimis* test contemplates. As the Secretary emphasizes, a claimant is denied benefits at step two on the basis of medical evidence alone. Pet.Br. 16-17.

By its terms, the severity regulation substitutes a judgment regarding the ability to do basic work activities for an evaluation of the claimant's actual capacity to do his prior work. But an inability to do "basic work activities" cannot be consistently equated with an inability to do one's prior work—the statutory *prima facie* burden of proof standard. The fact that a claimant's "abilities and aptitudes necessary to do most jobs" are not "significantly limited" does not establish that he is still able to do his past work or, considering his age, education and work experience, other work. "Step two . . . permits the Secretary to label a claimant as not disabled, even though his impairments *in fact* prevent him from doing his past work." *Johnson* v. *Heckler*, 769 F.2d at 1202, 1211 (emphasis in original). Respondent Yuckert, for example, was denied benefits at step two notwithstanding her presenta-

[12] The Secretary relies on this aspect of the severity regulation to urge that it implicates "vocationally-related considerations." Pet.Br. 22. But this assertion is contradicted by his insistence that "the principle reflected in the regulation. . . . [is] that a person may be denied disability benefits on the basis of medical evidence alone. . . ." (*See, e.g.*, Pet.Br. 16-17.) Moreover, describing basic work activities as "vocational" does not turn them into the individual claimant's past work, age, education and work experience, the vocational factors identified in the Act.

tion of evidence of her inability to do her previous work: that showing should have been sufficient to require a determination of whether she actually was unable to do her past work and if so, whether there was other work she was competent to do in light of her vocational factors.[13] Under the Secretary's sequential evaluation procedures, the fourth step directly asks whether the claimant can perform his past work, i.e., meet his prima facie burden. To operate consistently with the Act's allocation of the burdens, steps one through three cannot impose a test that exceeds the claimant's prima facie burden.

In sum, the severity regulation that the Secretary adopted, unlike a *de minimis* step two test, denied benefits to claimants who might have been able to prove their eligibility at a later stage of the sequential evaluation. It created an overbroad presumption of non-disability based on an unspecified degree of functional loss in reference to the performance of an abstract concept of work. This

[13] Petitioner quotes the ALJ's and magistrate's findings that Respondent Yuckert's struggle to learn new skills and to reenter the work force are evidence that she is not disabled. Pet.Br. 5-6. This focus on Respondent's rehabilitation efforts as evidence of ability to engage in substantial gainful activity is misplaced. The Social Security disability program not only encourages but often requires efforts at vocational rehabilitation. 20 C.F.R. § 416.212. Congressional concern for providing vocational rehabilitation for disabled workers was expressed in the earliest discussions of the disability program. *See* S.Rep.No. 1669, 81st Cong., 2d Sess. at 3, reprinted in [1950] U.S. Code Cong. & Ad. News 3287, 3289. In some instances, disability benefits will continue during a course of rehabilitation even though the actual disability has ceased. *Paskel* v. *Heckler*, 768 F.2d 540, 546 (3d Cir. 1985), citing *Leschniok* v. *Heckler*, 713 F.2d 520 (9th Cir. 1983). Even attendance at a law school has been found not to preclude a finding of disability. *Detamore* v. *Schweiker*, 569 F.Supp. 288, 290 (E.D.Pa. 1983).

precluded the type of practical, individualized assessment the Act requires, see *Campbell*, 461 U.S. at 467, and relieved the Secretary of his responsibility to meet his burden of going forward, even when a claimant may have met his prima facie burden of showing an inability to do his past work.

4. The Secretary has consistently applied the severity regulation to impose upon claimants a stricter than *de minimis* step two test. His assertion that the severity regulation was implemented as a *de minimis* standard to screen out relatively minor impairments, Pet.Br. 10, 13, 14, 26, 27, has no support in the record here, or elsewhere. The appellate courts have concluded that the Secretary applied the severity regulation in a stricter than *de minimis* way. *See supra*, at 17. There is no contrary appellate authority. The Secretary's claim is also contradicted by his own Social Security rulings and internal studies of the implementation of the regulation, as well as the dramatic rise in the percentage of claims denied on medical evidence alone. *See supra*, at 4, 7-9.

The relevant rulings establishing the policies defining step two are SSR 82-55 and SSR 82-56. *See supra*, at 7-8. In SSR 82-55, the Secretary listed twenty impairments illustrative of mental and physical impairments that were to be considered per se non-severe under step two regardless of the claimant's actual ability to work. SSR 82-56 stated that the non-severe test permits denials of benefits "*even though* . . . [the impairment] may prevent the individual from doing work that the individual has done in the past." The Secretary denied benefits to claimants with impairments on the SSR 82-55 list (or any other impairments *thought to be* of comparable severity), regardless of whether the impairments prevented claimants from doing their past work. *Id.* The Secretary's

severity regulation thus clearly violated the Act's allocation of the burden of proof.

The Secretary's assertion that he has construed the severity regulation as a *de minimis* standard is also belied by his own arguments in defense of the statutory legitimacy of a stricter than *de minimis* test, and by his defense of a stricter than *de minimis* application of the severity regulation itself. Thus, in *Salmi* v. *Heckler*, 774 F.2d 685, 690 (6th Cir. 1985), the Secretary argued that the severity requirement ". . . [i]mposes more than a *de minimis* threshold requirement . . ." and that, ". . . [a]t least implicitly, Congress did not intend a standard as lenient as *Brady*." *See also Williamson* v. *Secretary of Health and Human Services*, 796 F.2d 146, 150 (6th Cir. 1986) (rejecting the Secretary's argument that "when the evaluation terminates at step two on a finding of no severe impairment, it does not matter whether the claimant satisfies the criteria in the Listing of Impairments [per se disabling impairments]."). Consistently, the Secretary has defended non-severe denials where the medical evidence has unambiguously described impairments of "serious proportions." *Mowery* v. *Heckler*, 771 F.2d 966 (6th Cir. 1985); *Martin* v. *Heckler*, 748 F.2d 1027 (5th Cir. 1984); *Glover* v. *Heckler*, 588 F.Supp. 956 (S.D.N.Y. 1984); *Evans* v. *Heckler*, 734 F.2d 1012 (4th Cir. 1984).[14]

5. The Secretary's defense of a stricter than *de minimis* test rests on his bifurcating the statutory definition.

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[14] These cases cannot be considered aberrations, or misapplications by administrative law judges. The Secretary defended these denials as proper applications of the severity regulation. Petitioner has incorrectly cited the *Evans* case to support the proposition that the Fourth Circuit "has sustained decisions of the Secretary *denying* benefits based on a finding that the claimant's impairment was not severe. . . ." Pet.Br. 18 n.9 (emphasis added).

Pet.Br. 13, 25-6. He describes § 423(d)(1)(A) as a provision that requires a claimant to make a threshold showing of substantial medical severity. Only if such a showing is made, he argues, does the Act allow the claimant to proceed to make the showing § 423(d)(2)(A) requires. His alternative presentation of this statutory formulation is that § 423(d)(2)(A) does not impose any prerequisites to a *denial* of benefits at the threshold step, such as consideration of past work, age, education and work experience; rather, it only poses additional burdens on the claimant. Pet.Br. 25.

The Secretary's argument cannot survive even a quick glimpse at the statute. The first words in § 423(d)(2)(A) are, "[f]or purposes of Paragraph (1)(A)—. . . ." The two subsections form a unitary statutory definition: section (d)(2)(A) is to be implemented in determining whether or not a claimant is "unable to engage in any substantial gainful activity," within the meaning of section (d)(1)(A). By its terms, it does not set forth requirements that become relevant only after a (d)(1)(A) determination is made.

The Secretary seeks to disparage—in a footnote—the well-established statutory allocation of the burden of proof, which the court of appeals relied upon in finding the severity regulation inconsistent with the Act. Pet.Br. 28-9 n.15; Pet.App. 10a-11a. His argument is, however, contradicted not only by the decisions of twelve courts of appeals, *see supra*, at 17, but also by the Secretary's own previously expressed understanding when he promulgated the sequential evaluation regulations. 43 Fed.Reg. 55359 (1978) ("The burden of proof remains as established in case law . . . .").[15] Further, Congress agrees that the

[15] The reference was to the line of cases beginning with *Meneses* v. *Secretary of Health, Education and Welfare*, 442 F.2d 803 (D.C.Cir. 1971). *Meneses* itself rejected the analysis the Secretary summarily offers in his brief, based on the 1967 amendments; and every other circuit has followed suit.

case law sets forth the formulation it intended. "[When a claimant shows an inability to do his past work, then] [a]t this stage, because of a judicial opinion and subsequent administrative and legislative ratification, the burden of proof switches to the Government . . . ." Staff of House Comm. on Ways and Means, 99th Cong., 2d Sess., Background Material on Programs Within the Jurisdiction of the Committee on Ways and Means, at 113 (Comm. Print 1986).

6. To counter the conflict between the statutory definition of disability and the severity regulation, the Secretary characterizes SSR 85-28 as setting forth a lawful *de minimis* standard, Pet.Br. 13-14, 26, 48, and implicitly urges this Court to consider the validity of the regulation in light of the ruling.[16] The Court should decline to do so for three reasons: (1) the ruling was issued in violation of the Disability Benefits Reform Act of 1984; (2) an examination of the ruling would require this Court to examine an ambiguous ruling which has not been interpreted by the lower courts; and (3) an interpretive ruling cannot effectively resolve the conflict between the severity regulation and the Act.

SSR 85-28 was issued in violation of the Secretary's obligation under the Disability Benefits Reform Act. See 42 U.S.C. § 421(k)(1)(2). Under this provision, the Secretary is required to establish by regulation subject to the rule-making procedures established under the Administrative Procedures Act (APA), 5 U.S.C. § 553 ". . . uni-

[16] Should this Court find that SSR 85-28 is potentially relevant to these proceedings, even though it did not exist at any time during the adjudication of Respondent Yuckert's claim, this case should then be remanded. See *Thorpe* v. *Housing Authority of Durham*, 386 U.S. 670, 673 and n.4 (1967) (vacating and remanding a challenge to public housing eviction procedures in light of an intervening agency circular which potentially affected the challenged procedures).

form standards which shall be applied in determining whether individuals are under disabilities defined in . . . 423(d) of this title." The legislative history of the provision indicates that "changes in policies that affect whether or not people receive disability benefits . . . [should] be published in the regulations allowing for public participation in the process." H.Rep. No. 618, 98th Cong., 2d Sess. 21, *reprinted in* [1984] U.S. Code Cong. & Ad. News 3058. See *Bowen* v. *City of New York*, 106 S.Ct. 2022 (1986) (describing consequences of making policy changes through secret instructions to staff). The Secretary uses the ambiguity of SSR 85-28 to make inconsistent arguments. If SSR 85-28 was intended to reform the severity step in response to judicial criticism, SSR 85-28, Pet.App. 40a, then it must be published pursuant to the Administrative Procedures Act.[17] On the other hand, if SSR 85-28 is merely a clarification of existing policy, Pet.Br. 10; Pet.App. 37a, it cannot be viewed as remedial.

This Court should decline to examine the contents of SSR 85-28 inasmuch as it contains factual issues that have not been passed on by the lower courts. *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941). The ruling contains no clear substantive standard.[18] It also makes no attempt to rec-

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[17] The public comment and resulting administrative scrutiny that the APA procedures afford might have cured some of the ambiguities that the appellate courts have identified in SSR 85-28. See *Hansen*, 783 F.2d at 175.

[18] SSR 85-28 is sufficiently contradictory to support the conflicting propositions that the ruling is only a clarification (implying that the severity step needs no reform), Pet.Br. at 10, and also that it reflects the orders of those courts which "have taken issue with the Secretary's previously stated definition of "not severe impairment" (implying that the ruling reforms the severity step), Pet.App., 40a. *See also*

oncile the Secretary's step two regulation with the well-established burden of proof rules. *See supra*, at 20. As a result, it is impossible to determine how the ruling would actually be applied. Only through discovery and an evidentiary hearing or on a record in a case in which the Secretary's ruling has been applied, could these questions be resolved.

7. Contrary to the Secretary's assertions, nothing in the court of appeals' decision bars implementation of a *de minimis* threshold standard. The Secretary's contrasting reading of the ruling is erroneous.

Pet.Br., 10.

On the one hand, the introduction and closing language of the ruling suggest the Secretary intends to adopt a *de minimis* standard and includes encouraging language on the limited applicability of the severity step. The ruling even misquotes a statement made in *Baeder* v. *Heckler*, 768 F.2d at 553 where the court found that the "severity regulation does more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature which would never prevent a person from working." (The Secretary's use of *Baeder* as a clarification of the severity policy is less than candid. SSR 85-28 suggests that *Baeder* stands for the proposition that the regulation "is to do no more than allow the Secretary to deny benefits summarily. . . ." SSR 85-28, Pet.App. 40a. The reliance on *Baeder* is ". . . entirely out of context," *Wilson* v. *Heckler*, 622 F.Supp 649, 654 (D.N.J. 1985), *aff'd.*, 796 F.2d 36 (3d Cir. 1986).

The actual standard set out in the heart of the ruling, however, does not screen out only those claimants whose impairments could "never" affect their ability to work. Instead, it restates the old approach of establishing an overbroad presumption that screens out all impairments which would have a "minimal" impact on the ability to do "most jobs." SSR 85-28, Pet.App. 41a. This same approach led to the development of lists of *per se* non-severe impairments (*see supra*, at 7-8), and is evidence of the "Secretary's intent to pay mere lip service to the *de minimis* standard." *Hansen* v. *Heckler*, 783 F.2d at 176 (10th Cir. 1986), *citing Stone*, 752 F.2d at 1103, 1106 (5th Cir. 1985).

The Secretary reads the court of appeals ruling to "require the decision maker to consider the vocational factors of age, education and work experience" at step two of the sequential evaluation process and to prohibit him from employing any threshold "severity step" at all. Pet.Br. 13, 22, 25. Neither understanding is correct.

As the court of appeals correctly noted, the Act requires the Secretary to consider "both medical and vocational factors" in disability determinations. Pet.App. 9a. It invalidated the Secretary's severity regulation because it authorized denials of benefits to claimants based on medical evidence alone, even where consideration of vocatonal factors could have dictated a different result. *Ibid.*

B. The Legislative History Of The Social Security Act And Its Amendments Demonstrates That Congress Endorsed Nothing More Than A *De Minimis* Severity Step.

1. Contrary to the Secretary's contentions, the legislative history of the Act shows that Congress intended that disability determinations be based on a consideration of medical and vocational factors and that any congressional support for a threshold medical test was premised on the assumption that the test would be *de minimis* and would not screen out claimants who would otherwise be found disabled if vocational characteristics were considered.

2. The 1954 definition of disability required that impairments be evaluated in terms of their effect on the claimants' ability to engage in substantial gainful activity. *See supra*, at 2. Furthermore, as the Secretary acknowledges, his own contemporaneous regulations implementing this statutory definition required an inquiry into the individual's education, training and work experience."

Pet.Br. 38, n.22 (*quoting* 22 Fed.Reg. 4362 (June 20, 1957)). Similarly, subsequent revisions to the regulations, prior to adoption of the severity regulation, only authorized a *de minimis* threshold test to screen out claimants with slight impairments. Thus, in now arguing that the 1954 statute authorized a threshold medical test that would deny benefits to persons who would otherwise be found disabled, the Secretary faces the heavy burden of showing that his contemporaneous interpretations misperceived congressional intent. He does not meet that burden. *See Salmi* v. *Secretary of Health and Human Services*, 774 F.2d at 690 (Secretary's litigation position on the meaning of the 1954 conference report conflicts with his own previous interpretations).

The Secretary places substantial reliance on language from the 1954 congressional reports, stating that a claimant must be "totally" disabled. Pet. Br. 30, 31. He suggests that by excluding persons who were "partially disabled" Congress meant to preclude consideration of vocational factors in determining disability. There is no indication that Congress, or SSA, understood the term "total disability" to preclude consideration of vocational factors. On the contrary, the agency's directives implementing the first federal-state disability program, the Aid to the Totally and Permanently Disabled (ATPD), clarify the agency's interpretation of the terms.[19] The

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[19] House Report No. 1189, 84th Cong., 1st Sess. (1955), discusses congressional reliance on the agency's implemetation of the ATPD program in enacting the first program for the payment of disability benefits, based on the 1954 definition of disability. "We have now had 4½ years of experience with the special category of aid to the permanently and totally disabled. . . . The adoption, in 1950, of the assistance program to provide for the income maintenance needs of the disabled clearly expressed the intention of the Congress that the

Social Security Administration's Bureau of Public Assistance offered the following definitions to states to guide disability determinations:

> In general, "permanently and totally disabled" means that the individual has some permanent physical or mental impairment, disease or loss that substantially precludes him from engaging in useful occupations within his competence, such as holding a job or homemaking. . .
>
> * * *
>
> The term "permanently" refers to a physiological, anatomical or emotional impairment verifiable by medical findings . . . "permanence" does not rule out the possibility of vocational rehabilitation or even recovery from the impairment.
>
> * * *
>
> "Totally" involves considerations in addition to those verified through the medical findings, such as age, training, skills and work experience, and the probable functioning of the individual in his particular situation in light of his impairment. . . . In many cases no decision as to total disability can be made without such social data as will describe the individual's education and work history, the activities required of him in his home or in his job, living and working conditions, interests, native capacities and the extent to which he has adjusted to the loss he has sustained. . . .

Social Security Administration State Letter No. 174 § 3420 (April 16, 1952).

Furthermore, sections of the legislative history upon which the Secretary relies are quoted out of context. The

disabled should not be allowed to go without the necessities of life. It also indicated the judgment of the Congress that it was administratively feasible to determine who is disabled. . ." *Id.* at 4.

Secretary quotes the Senate Finance Committee Report, Pet.Br. 31, 32, which acknowledges that "[s]tandards for evaluating the severity of disabling conditions will be worked out in consultation with the state agencies." But petitioner omits the subsequent (which is the final) sentence, which clearly reflects the congressional intention that the severity of impairments will be evaluated in terms of a claimant's ability to perform in actual work settings:

> [the standards] will reflect the requirement that the individual be disabled not only for his usual work but also for any type of substantial gainful activity.

S.Rep. No. 1987, 83rd Cong., 2d Sess., 21 (1954).

See also Baeder v. *Heckler*, 768 F.2d at 551, ("Both the statute and the legislative history speak in terms of medical *and* vocational factors and emphasize the importance of the relation between the two," citing *inter alia* Senate Report No. 1987, *supra*).[20]

[20] Petitioner also relies on the Disability Freeze State Manual, an administrative document issued in 1955 to instruct the states in making disability determinations under the 1954 Act. Pet.Br. 34, n.20. To the extent that this manual has any bearing on congressional intent, it supports the court of appeals' conclusion that the statute requires a realistic evaluation of ability to work in light of medical and vocational considerations. The manual describes the importance of considering "age, education, training, experience, and other individual factors . . ." in any case where a realistic evaluation cannot be made on the basis of the medical factors plus cessation of work. See § 324B. The manual instructs that, "[i]n evaluating the effect of an impairment, it should be considered that the impairment may be more limiting for an older than for a younger man," noting that the aging process "makes itself felt with respect to healing, prognosis, physiological degeneration, psychological adaptability and, in consequence, on vocational capacity." § 325B. The section concludes that "the impact of the aging process upon the specific individual will have

3. The Secretary also relies on post-enactment hearings which were held in 1959 to review the disability program. Again, these hearings show that Congress was assured that disability determinations would be made on a realistic basis in light of medical and vocational considerations. In these hearings, Robert Ball, then Deputy Director of the Bureau of Old Age and Survivor's Insurance, assured Congress that the agency would not deny benefits to a person with a medically determinable impairment based on the individual's not meeting listed medical conditions. Mr. Ball stated:

> [W]e will make the presumption that if his disability is that severe [as is stated in the guides] that the fact he is not working is because of or by reason of that medically determinable physical or mental impairment. *The presumption does not work the other way around, though.* We will make the presumption that he is disabled for working if he meets the level of severity in the guides and there are no facts to the contrary but we may pay him even though his disability does not reach this level of severity.

Administration of Social Security Disability Insurance Program, Hearings Before the Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means, 86th Cong., 1st Sess., at 28-29 (1959) (emphasis added).

Mr. Ball's exchange with Rep. Harrison revealed the identical interpretation of the statutory definition which

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to be considered in connection with the particular impairment claimed to prevent substantial gainful activity." *Ibid.* The manual also recognizes that "education and training are factors in determining the employment capacity of an applicant." § 326. The manual's listing of per se disabling conditions does not override its clear requirement that a realistic evaluation be made of a claimant's inability to work.

is explicit in the Medical-Vocational guidelines today, *i.e.*, that the statutory definition requires a realistic evaluation of inability to engage in substantial gainful activity, which necessitates a consideration of a person's age, education and experience:

> Mr. Harrison. A woodchopper with a third grade education might get so he can't chop wood. He is a lot worse off then Mr. Herlong would be if he got so he couldn't chop wood. Isn't that right?
>
> Mr. Ball. That is right.

Id. at 69.

Thus the administrative interpretation of the statutory standard brought to Congress' attention reveals an emphasis on realistic evaluations of a claimant's capacity to work in light of medical and vocational considerations. The agency's early interpretation of the statute included a *de minimis* screening standard. Congress had no reason to regard it as more, in light of the testimony given by the agency's director, as well as its chief medical officer,[21] and the agency's regulations which required consideration of

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[21] The testimony of Dr. William Roemmich, Chief Medical Officer to the Division of Disability Operations, Pet.Br. 37, n.21, also supports a *de minimis* screening standard. Dr. Roemmich interprets the severity concept inherent in the basic statutory definiton:

> "Under the law, severity must be established in terms of the applicant's remaining capacity to work. Once remaining capacity to engage in physical or mental activity has been determined, such capacity must be equated with the physical or mental activity demands of the jobs which the applicant is equipped to do by virtue of personal and vocational aptitudes."

Administration of Social Security Disability Insurance Program, Hearings Before the Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means, 86th Cong., 1st Sess., at 341 (1959).

vocational factors unless the only impairment was slight. 25 Fed.Reg. 8100 (Aug. 24, 1960).

4. Petitioner offers two inconsistent interpretations of the 1967 amendments and their legislative history. Recognizing that the 1967 amendments did not prompt the Secretary to revise his regulations, petitioner argues that Congress ratified his pre-existing regulations. Pet.Br. 39. He proceeds, however, to rely on the legislative history of the 1967 amendments to show that Congress intended to impose more than the *de minimis* threshold test set forth in the Secretary's pre-existing regulations. Pet.Br. 40.[22] Read in context, the legislative history of the 1967 amendments shows that Congress was concerned with sorting out which factors should be considered in disability determinations.[23] While rejecting some considerations—such as the inability to find a job due to cyclical economic factors—Congress expressly incorporated into the statutory definition of disability the four vocational considerations that had been part of the disability determination process since 1954: age, education, work experience, and ability to return to prior work. In doing so, Congress ratified the established case law on the burden of proof in determining disability. Nowhere did Congress show any intent to abandon the requirement that medically determinable impairments be evaluated in light of age, education, work experience and ability to return to past work. *See Stone* v. *Heckler*, 752 F.2d at 1105; *Dixon* v. *Heckler*, 589 F.Supp. at 1504-05.

[22] The Secretary bases his reading of the 1967 amendments on a limited excerpt from the legislative history that simply states that an impairment must be severe, without stating whether severity must be analyzed by viewing medical and vocational considerations in combination. One court observed, "the passage relied upon by the Secretary is somewhat ambiguous; it can be read simply as an explanation of the overall circumstances under which a finding of disability or non-disability will be made, rather than as a fixed sequence of screening steps under which a "severity" test is somehow a condition precedent to any consideration of the claimant's ability to engage in his prior work or of the other vocational factors." *Dixon* v. *Heckler*, 589 F.Supp. at 1505. The *Stone* court also rejected the Secretary's analysis of the 1967 amendments; the Secretary there carried his unfounded argument to its logical conclusion, namely, that the Secretary was not required to find a claimant disabled, even if the claimant proved his impairment prevented him from doing his prior work or in light of his age, education and experience, any other work. *Stone* v. *Heckler*, 752 F.2d at 1105. *See also Baeder* v. *Heckler*, 768 F.2d at 551. Congress simply did not write the statute in the way the Secretary would ask this Court to read it.

Congressional intent to retain a medical-vocational analysis for disabled workers is further reflected in contemporaneous amendments regarding eligibility for disabled widows. Although Congress provided that disabled widows must meet a prescribed test of medical severity, Congress specifically declined to amend the basic definition of disability for workers. *See supra*, at 3, 20, n.10.

[23] Congress was concerned with judicial interpretations of the Social Security Act which looked to a very narrow geographic area in determining whether an individual could perform substantial gainful activity or which considered whether a vacancy was available for the claimant. *See, e.g., Tigner* v. *Gardner*, 356 F.2d 647 (5th Cir. 1966); *Wimmer* v. *Celebrezze*, 355 F.2d 289 (4th Cir. 1966); *Reagie* v. *Gardner*, 261 F.Supp. 184 (D.Mont. 1966). The 1967 amendments specifically addressed this case law by providing that the evaluation of substantial gainful activity should be made without regard to whether "such work exists in the immediate area in which [the claimant] lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. § 423(d)(2)(A).

5. Finally, the Secretary argues that the Disability Benefits Reform Act of 1984 "effectively ratified" the severity regulation. Pet.Br. 44. Once again, the Secretary's argument begs the question of what kind of threshold test Congress approved. The legislative history of the 1984 Act conclusively shows that Congress was concerned with remedying the Secretary's improper refusal to consider the combined effect of multiple impairments, not with ratifying the severity regulation.[24] Furthermore, the legislative history sanctions nothing more than a *de minimis* test for screening out groundless claims. Indeed, every circuit court, including the court below, which has considered the Secretary's arguments regarding the 1984 Act has rejected the Secretary's suggestion that the Act approved more than a *de minimis* threshold test. *See e.g., Yuckert* v. *Heckler,* Pet.App. 9a-10a; *Johnson* v. *Heckler,* 769 F.2d at 1213-1214; *Hansen* v. *Heckler,* 783 F.2d at 174; *McDonald* v. *Heckler,* 795 F.2d at 1126-1127.

Section 4(a)(1) of the 1984 Amendments, Pub.L. 98-460, 98 Stat. 1794, remedied the Secretary's prior refusal to consider the combined effects of impairments. Under this amendment:

> In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

[24] This Court has recently recognized that "[t]he Reform Act is remedial legislation, enacted principally to be of assistance to large numbers of persons whose disability benefits have been terminated." *Bowen* v. *City of New York,* 106 S.Ct. 2022-2033, n.14. *See also Johnson* v. *Heckler,* 769 F.2d at 1212 (rejecting the Secretary's construction of the 1984 legislative history).

This amendment made no change in the 1954 definition of disability other than to require the Secretary to consider the combined effect of all of an individual's impairments on his ability to work.

The Conference Report on the 1984 amendments to the Social Security Act explained the "present law" on multiple impairments:

> There is no statutory provision concerning the consideration of the combined effects of a number of different impairments. The definition of disability requires a finding of a medically determinable impairment *of sufficient severity to prevent the person from doing not only his previous work but also any other kind of work that exists in the national economy, considering his age, education and work experience.* By regulation, the combined effects of unrelated impairments are considered only if all are severe (and expected to last 12 months).

Joint Explanatory Statement of the Committee of Conference, H.Rep. No. 98-1039, 98th Cong., 2d Sess., *reprinted in* [1984] U.S. Code Cong. & Ad. News 3087 (emphasis added).

The Conference Report described the purpose of the multiple impairment provision which was enacted into law as follows:

> The conferees believe that this policy [of not considering the combined effect of multiple "non-severe" impairments] may preclude realistic assessment of

> those cases involving individuals who have several impairments which in combination may be disabling. The conference agreement provides, therefore, that *in determining whether an individual's impairment or impairments are so severe as to prevent him from engaging in substantial gainful activity,* consideration must be given to the combined effect of all the individual's impairments without regard to whether any single impairment considered separately would limit the individual's ability.

Id. at 3088 (emphasis added).

The Conference Committee's explanation of the purpose of the multiple impairment provision is consistent with the plain language of the provision itself. The Committee's use of the phrase "so severe as to prevent him from engaging in substantial gainful activity" in this paragraph follows the basic statutory definition of disability, which defines the eligibility standard as an inability to engage in substantial gainful activity by reason of any medically determinable impairment.

Furthermore, the Conference Committee's statement on the sequential evaluation process requires that the Secretary not apply a severity standard that exceeds a *de minimis* test.

> [A] determination that an individual is not disabled may be based on a judgment that an individual has *no impairment*, or that the medical severity of his impairment or combination of impairments is *slight* enough to warrant a *presumption*, even without a *full* evaluation of vocational factors, that the individual's ability to perform SGA is not seriously affected. The current 'sequential evaluation process' allows such a determination and the conferees do not intend to either eliminate or impair the use of that process. The conferees note that the Secretary has stated that it is her plan to reevaluate the current criteria for

> non-severe impairments and expect that the Secretary will report to the Committee on the results of this evaluation.

Id. at 3088 (emphasis added).

In adopting this language, the Conference Committee rejected the Senate Report's statement that the severity regulation could be applied to deny claims "on a strictly medical basis, and without regard to vocational factors."[25] In contrast, the screening standard articulated by the Conference Committee states that a finding of *no* impairment, or a *slight* impairment will not warrant a *full* evaluation of vocational factors. The phrase "without a full evaluation of vocational factors" suggests that the standard for evaluating slight impairments will be guided by an implicit, or limited vocational analysis. Thus, Congress would permit a *de minimis* regulation such as that promulgated in 1957 and publicly endorsed by the Secretary in 1978.

It is the congressionally sanctioned *de minimis* standard which the courts have imposed on the Secretary to restrain his illegal construction and implementation of the severity regulation. (*See supra*, at 17.) That standard, however, was not applied during the adjudication of Respondent's case.

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[25] Petitioner also relies on the partisan, post-conference statement of Senator Russell Long in order to demonstrate that Congress had a different understanding of the severity regulation. Pet.Br. 44. Senator Long's comments, howver, reiterated the views of the Senate Finance Committee which were rejected in conference. Therefore, they are not a reliable guide to congressional intent. *Chrysler Corp* v. *Brown*, 441 U.S. 181, 211 (1979).

II. INVALIDATION OF THE SEVERITY REGULATION IS AN APPROPRIATE REMEDY TO RESOLVE THE CONFLICT BETWEEN THE SOCIAL SECURITY ACT AND THE ILLEGAL SCREENING STANDARD AUTHORIZED BY THE SEVERITY REGULATION

The Secretary's opposition to the court of appeals' invalidation of the severity regulation relies on decisions which the Secretary claims upheld the severity regulation "[as a] valid administrative implementation of the statutory standard of disability." Pet.Br. 17-18. Reliance on these cases is wholly misplaced. These cases actually condemn the Secretary's application of the severity regulation as imposing a stricter threshold standard than the Act authorizes. *See supra*, at 17. Rather than invalidate the regulation, however, these courts attempted to bring the regulation into conformity with the Act by insisting on a narrowing (*de minimis*) construction of the regulation. In one case, the court required the Secretary to make explicit reference to the court's interpretation of the regulation. *See Stone* v. *Heckler*, 752 F.2d at 1106.

The only relevant distinction between the cases on which Secretary relies and those which invalidated the severity regulation is their choice of solutions to the problem of "how best to remedy the Secretary's apparent continuing intent to apply the step two severity regulation in a manner that conflicts with the Act and the controlling case law." *Hansen* v. *Heckler*, 783 F.2d at 176; *see also Brown* v. *Heckler*, 786 F.2d at 871-3.[26] To affirm the decision of the court below, this Court need only find that the remedy that the court of appeals chose was within its authority, *i.e.*, a reasonable remedy under all the circumstances. *See Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971). In fact, the purpose of both remedies is the same in terms of the intended relief for plaintiffs. Under either remedy, Ms. Yuckert is entitled to a remand for reevaluation of her claim without reference to a stricter than *de minimis* screening standard.

[26] If this Court accepted review on the assumption that the question the Secretary presented implicated a conflict among the courts of appeals over the interpretation of the Act, that assumption was erroneous. Under similar circumstances, this Court has dismissed the writ of certiorari as improvidently granted. See *Smith* v. *Butler*, 366 U.S. 161 (1961); *Layne & Bowler Corp.* v. *Western Well Workers*, 261 U.S. 387, 392-393 (1923).

While imposing a narrowing construction would have been within the court's authority, invalidation was more likely to be an effective remedy in light of the Secretary's steadfast refusal to construe the severity regulation in a *de minimis* fashion despite the chorus of appellate decisions directing him to do so.[27] *See Hansen* v. *Heckler*, 783

[27] In *Dixon* v. *Heckler* 589 F.Supp. 1494, 1509 (S.D.N.Y.) *aff'd*, 785 F.2d 1102 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3017 (July 15, 1986) (No. 86-2), the court prelimnarily enjoined the severity regulation, rejecting the alternative narrowing construction approach as "likely to result only in continued confusion and endless appeals of decisions in which the Secretary's findings of non-severity are reversed for failure to follow the court's construction of the regulation." That court's doubts respecting the efficiency of the narrowing construction remedy were later borne out in the Fifth Circuit. *See Stone*, 752 F.2d at 1105 (noting the Secretary's continued refusal to follow the *de minimis* standard, notwithstanding three previous Fifth Circuit decisions adopting it).

Even though invalidation might reasonably be thought to be the more effective remedy, it is less restrictive in that it leaves the Secretary free not only to enforce a *de minimis* step two, but to omit step two entirely. It is the latter option that the Secretary has in fact chosen in many jurisdictions in which the severity regulaton has been invalidated. Furthermore, the Secretary himself has suggested that a prior work threshold screening step may be an equally or more efficient one than the second (non-severe) step at issue in this litigation. See *Chico* v. *Schweiker*, 710 F.2d 947, 952-953, n.6 (2d Cir. 1983).

F.2d at 176 (referring to Secretary's "history of disregarding those controlling court rulings with which she disagrees.") *See also Brown* v. *Heckler*, 786 F.2d at 872. Because the court of appeals properly ruled that the severity regulation exceeded the *de minimis* test permitted by the Act, and therefore "exceed[ed the] Secretary's statutory authority," it acted well within its authority to invalidate the regulation.[28] Its decision should therefore be affirmed.

Should the Court decide that invalidation of the regulation was an impermissible means of ensuring that claimants would not be subjected to a stricter than *de minimis* threshold standard, then this Court should be guided by the appellate courts that have adopted the alternative remedy of imposing a narrowing construction on the regulation. Inasmuch as both remedies were designed to

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[28] *Heckler* v. *Campbell*, 461 U.S. 458, 467 (1983). While some deference to the construction of a statute by the administrative agency charged with its implementation is appropriate, there is a limit to this deference where there are compelling indications that the agency's interpretation is wrong. *See, e.g., Securities Industry Association* v. *Board of Governors*, 104 S.Ct. 2979 (1984); *Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103 (1978); *Espinoza* v. *Farrah Manufacturing Company*, 414 U.S. 86 (1973); *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726 (1973). As recently restated, "Judicial deference to an agency's interpretation of a statute only sets the framework for judicial analysis; it does not replace it," and "a reviewing court must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Securities Industry Association* v. *Board of Governors*, 104 S.Ct., at 2983, quoting prior cases. Moreover, the Secretary's inconsistent formulation and interpretation is not deserving of the deference normally accorded agency interpretation. *See General Electric Company* v. *Gilbert*, 429 U.S. 125, 140-142 (1976).

prevent the Secretary from applying a stricter than *de minimis* screening standard, Respondent Yuckert would be entitled to relief similar to that granted by the court of appeals even if this Court were to instruct the court below to adopt the alternative remedy.[29]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[29] If this Court does decide that imposing a narrowing construction on the regulation is the appropriate remedy, it should still not reach the question of whether SSR 85-28 or any similar ruling constitutes such a narrowing construction. See *supra*, at 30. The impact of SSR 85-28 on the severity step cannot be determined without further factual development. SSR 85-28 can be viewed as articulating a *de minimis* standard only if it is read to respect the burden of proof law (a "finding of not severe is inappropriate if the claimant is unable to do his . . . past work") and applied so as to deny benefits summarily his only to claimants whose impairments are so minimal that they could never prevent anyone from working. *McDonald* v. *Heckler*, *supra*, 795 F.2d at 1125.